

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
ccAdvertising)	CG Docket No. 02-278
)	DA 04-3187
Petition for Expedited)	
Declaratory Ruling)	

**REPLY COMMENTS OF
ccADVERTISING**

FreeEats.com, Inc. d/b/a ccAdvertising (“ccAdvertising”) has requested that the Commission declare that North Dakota’s prohibition on the use of automatic telephone dialing systems or prerecorded voice messages to make interstate political polling calls is preempted.

Since the Commission reopened the record on ccAdvertising’s Petition for Expedited Declaratory Ruling (the “Petition”), only one commenter has opposed the request. From a record that now approaches 44,000 comments, the limited opposition to ccAdvertising’s request reflects the fact that North Dakota is decidedly in the minority in its attempt to regulate the types of interstate calls that are the subject of the Petition.¹

The vast majority of the docketed comments are from individuals responding to grass-roots campaigns to support their states’ (primarily Indiana, Wisconsin and New Jersey) laws regulating fraudulent or deceptive telemarketing practices. Numerous

¹ Utilizing a proprietary software program, ccAdvertising conducted a search of all comments in Docket No. 02-278 and found that of the 43,917 docketed items submitted through August 8, 2005, just 3.34% contained references to the issues relevant to the Petition or to the types of calls and services that ccAdvertising performs.

commenters focus on broad jurisdictional issues affecting all state laws that attempt to regulate interstate calls. But only one commenter, the State of North Dakota (“North Dakota”), directly opposes the Petition.²

I. North Dakota’s State Court Decision Does Not Preclude The Commission from Granting the Petition

North Dakota largely repeats prior arguments that it has made opposing and seeking to dismiss the Petition.³ However, as North Dakota notes,⁴ and as ccAdvertising previously informed the Commission, one fact has changed since the Petition was filed. On February 2, 2005, a State district court issued an Order and Opinion (the “Opinion”) granting North Dakota’s Motion for Summary Judgment with respect to liability in a case in which the state seeks to enforce the state law provision that is the subject of the Petition, which states:

A caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber’s consent before the message is delivered. This section and section 51-8-05 do not apply to messages from school districts to students, parents, or employees, messages to subscribers with whom the caller has a current business relationship, or messages advising employees of work schedules.

N.D. Cent. Code § 51-28-02.

² North Dakota’s Supplemental Comment Upon Reopening of Comments on FreeEats.com, Inc.’s Petition for Expedited Declaratory Ruling, July 29, 2005 (“Supplemental Comment”).

³ North Dakota continues to assert that the doctrine of sovereign immunity “bars the Petition” and prevents the Commission from issuing the requested ruling. Supplemental Comment at 1, 8. As ccAdvertising already has shown, sovereign immunity does not apply to executive agency preemption under the circumstances presented by the Petition. See ccAdvertising’s Opposition to Motion to Dismiss Petition on Grounds of Sovereign Immunity or in the Alternative to Stay Proceedings, CG Docket No. 02-278, DA 04-3187, November 18, 2004 (incorporated herein by reference).

⁴ Supplemental Comment at 7.

The State court decision (which ccAdvertising has appealed) demonstrates the need for Commission action. In concluding that the Telephone Consumer Protection Act does not preempt North Dakota law, the State court relied exclusively on a 1995 decision by the 8th Circuit Court of Appeals, *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995). According to the state court, its reliance on *Van Bergen* is warranted because that case “addressed the very issues presented” in the state’s enforcement action. Opinion at 3.⁵ Based on fundamental errors in the court’s reasoning, and because the court never addressed the specific issues raised by the Petition, the Opinion should have no effect on the Commission’s consideration of the Petition.

At issue in the state’s enforcement action against ccAdvertising, and in the Petition, is whether North Dakota law as applied to ccAdvertising’s interstate political polling calls is preempted by federal law. In contrast, in *Van Bergen* the nature of the calls was never revealed. Thus, the 8th Circuit did not address the issue of preemption as applied to interstate calls. Consequently, the North Dakota court’s conclusion that *Van Bergen* “addressed the very issues presented” is simply wrong. The error is obvious, because the court found that *Van Bergen* was inconclusive with respect to whether interstate or intrastate calls were at issue in that case. Opinion at 6 (the nature of the calls in *Van Bergen* “was not explicitly stated, or even implied”). The state court even acknowledged that the plaintiff “did not even place any calls, he sought an injunction [against enforcement by the State of Minnesota] before placing them.” *Id.*

The state court compounded the error of its reliance on *Van Bergen* by assuming that had the plaintiff in *Van Bergen* placed any calls, those calls *would have been*

⁵ A copy of the Opinion is on file in CG Docket No. 02-278 and DA 04-3187. See Letter to Marlene H. Dortch from E. Ashton Johnston, February 8, 2005.

interstate calls. *See* Opinion at 6. In doing so, the state court repeated the mistake that North Dakota has made opposing the Petition before the Commission by reading the savings clause in the TCPA to preserve from preemption not only state rules covering intrastate calls, but also state rules covering interstate calls. The state court also failed to consider that *Van Bergen*'s conclusion that the TCPA was intended to "supplant state law," 59 F.3d at 1548 only makes sense if the state law at issue refers to regulation of intrastate calls. In sum, the State court's Opinion, which is the subject of an appeal by ccAdvertising, is not entitled to deference. "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.... [T]he agency remains the authoritative interpreter (within the limits of reason) of such statutes." *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, Case No. 04-277, slip op. at 10-11 (S. Ct. June 27, 2005). The State court decision should not deter the Commission from issuing the requested ruling; indeed, in light of the court's errors Commission action is critical.

II. Section 414 of the Communications Act Does Not Preserve N.D.C.C. § 51-28-02

North Dakota asserts that Section 414 of the Communications Act, which states "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies," somehow preserves its authority to regulate interstate political polling calls. Supplemental Comment at 4. But Section 414 simply does not have the reach that

North Dakota claims. As the Commission has explained in response to assertions that Section 414 preserved rights under state law that were preempted by another provision of the federal Communications Act, “Under accepted principles of statutory construction, ... the savings clause cannot preserve state law causes of action or remedies that contravene express provisions of” the Communications Act. *In the Matter of Wireless Consumers Alliance, Inc.*, 15 FCC Rcd 17021, 17040 (2000). Here, North Dakota’s law prohibiting interstate political polling calls into North Dakota contravenes Section 227 and Section 2(b) of the Communications Act. Consequently, Section 414 cannot “preserve” N.D.C.C. Section 51-28-02.

Although North Dakota claims that Section 414 “preserves causes of action for breaches of duties distinguishable from those created under” the Communications Act, Supplemental Comment at 4, the cases North Dakota cites in support of this proposition are not applicable. The cases involve allegations of unfair and deceptive telemarketing practices – far different from the interstate political polling calls at issue here. Moreover, the cases North Dakota relies on are not even in agreement. Rather, they reveal that federal courts have not resolved the scope of Section 414, including whether Section 414 preserves state law claims that allege a breach of duties under federal law. *See* Supplemental Comment at 4-5.

III. Congress Did Not “Reject” Preemption of State Law Under the TCPA

North Dakota invites the Commission to consider the legislative history of the TCPA, citing as “fact” that “Congress deleted an express preemption of interstate call laws provision from the final version of the TCPA.” Supplemental Comment at 6. The state’s assertion of “fact” is wrong.

North Dakota relies on a law journal article that purports to explain the legislative history of the TCPA. *Id.* According to the article, Senate Bill 1410 (“S.1410”) “contained a specific preemption provision regarding interstate regulation,” which “provision was not included in the final version of the legislation.” *Id.* (quoting Veronica Judy, Are States Like Kentucky Dialing The Wrong Number Enacting Legislation That Regulations Interstate Telemarketing Calls?, 41 Brandeis L.J. 681, 691 (2003) (footnotes omitted)). However, S. 1410 did not purport to regulate, let alone prohibit, the conduct at issue here: the use of prerecorded voice messages in calls to residential subscribers. See 137 CONG. REC. 30,818 (1991) (prohibiting the use of prerecorded voice messages in calls to hospitals and cell phones). Thus, North Dakota’s conclusion that the “deletion” of language from the TCPA as enacted compels the conclusion that the intent of Congress was not to preempt state regulation of interstate political polling calls, simply has no basis in fact.

North Dakota also asserts as controlling precedent the case of *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (2000). In *Gulf Oil*, the issue was what interpretive weight to give to a phrase included in the version of a bill passed by the House but not in the version passed by the Senate, which was deleted by a vote of the House-Senate conference committee convened to negotiate differences between the two bills. See 419 U.S. at 200. However, unlike in *Gulf Oil*, the preemption provision of the TCPA was never deleted. Rather, the provision was contained in a bill addressing a limited range of issues that did not include the conduct at issue here, which was integrated into a far broader version of the TCPA that **did** address the conduct at issue here, and that, instead of relying on an express preemption provision contained in new text to be added to the

Communications Act, relied on the broad preemptive effect of the Communications Act. *See* 137 CONG. REC. 36,300 (1991) (“The amendment version before the Senate today ... incorporates the principal provisions of S. 1462 and S. 1410 ... and H.R. 1304.”) (“Section 227(e)(1) clarifies that the bill is not intended to preempt State authority regarding intrastate communications.... Pursuant to the general preemptive effect of the Communications Act of 1934, State regulation of interstate communications, including interstate communications initiated for telemarketing purposes, is preempted.”).

IV. ccAdvertising’s Political Polling Calls Are Lawful Under the TCPA and the Commission’s Rules

ccAdvertising’s interstate political polling calls are lawful under the TCPA and the Commission’s rules implementing the TCPA. The Commission’s rules specifically exempt non-commercial calls from the prohibition on initiating residential telephone calls using artificial or prerecorded messages without the prior consent of the called party. 47 C.F.R. § 64.1200(a)(2)(ii). As the Commission observed in its *2003 TCPA Order*, in 1992 “the Commission determined to exempt calls that are non-commercial and commercial calls that do not contain an unsolicited advertisement, noting the messages that do not seek to sell a product or service do not tread heavily upon the consumer interests implicated by” the TCPA.⁶

In its 1992 order, the Commission stated: “[T]he exemption for non-commercial calls from the prohibition on prerecorded messages to residences includes calls conducting research, market surveys, political polling or similar activities which do not

⁶ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Dkt. No. 02-278, *Report and Order*, 18 FCC Rcd 14014 ¶136 (2003) (“*2003 TCPA Order*”).

involve solicitation as defined by our rules.”⁷ ccAdvertising’s interstate political polling calls fall squarely within the scope of the non-commercial exemption. Notably, only a handful of states – like North Dakota – have extended their state law prohibitions on “telephone solicitation” or “telemarketing” to non-commercial calls; the vast majority of states have attempted to define “solicitation” or “telemarketing” consistent with the Commission’s rules.

ccAdvertising’s interstate polling calls also are permitted under the Commission’s rules prohibiting certain autodialed calls. The Commission prohibits the use of automatic telephone dialing systems (and artificial or prerecorded voice messages) to make telephone calls to certain numbers including emergency telephone lines, hospital lines, and cellular and paging lines. 47 C.F.R. § 64.1200(a)(1). The prohibition applies only to those particular classes of calls and does not cover ccAdvertising’s interstate political polling calls. In the *TCPA Order*, the Commission explained the policy rationale for prohibiting the use of autodialers only with respect to a particular class of calls:

The legislative history also suggests that through the TCPA, Congress was attempting to alleviate a particular problem – an increasing number of automated and prerecorded calls to certain categories of numbers. The TCPA does not ban the use of technologies to dial telephone numbers. It merely prohibits such technologies from dialing emergency numbers, health care facilities, telephony numbers assigned to wireless services, and any other numbers for which the consumer is charged for the call. Such practices were determined to threaten public safety and inappropriately shift marketing costs from sellers to consumers.⁸

⁷ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Dkt. No. 92-90, *Report and Order*, 7 FCC Rcd 8752 ¶40 (1992). Cf. H. Rep. No. 317, 102d Cong., 1st Sess. (1991) (“the Committee does not intend the term “telephone solicitation” to include public opinion polling, consumer or market surveys, or other surveys conducted by telephone”).

⁸ *TCPA Order* ¶ 133.

In sum, the Commission made clear more than a decade ago that it is lawful under the TCPA for businesses to use prerecorded voice messages and automatic telephony dialing systems to make interstate calls to conduct political polling of residential subscribers. More recently, the Commission made abundantly clear that more restrictive state efforts to regulate interstate calling that is lawful under the Commission's rules would almost certainly be preempted because such efforts frustrate the federal objective of creating uniform national rules. *TCPA Order* ¶ 84. Under the circumstances presented, North Dakota's prohibition on interstate political polling calls under N.D.C.C. § 51-28-02 must be preempted.

WHEREFORE, the foregoing premises duly considered, ccAdvertising respectfully requests that the Commission expeditiously grant its Petition for Declaratory Ruling.

Respectfully submitted,

ccAdvertising

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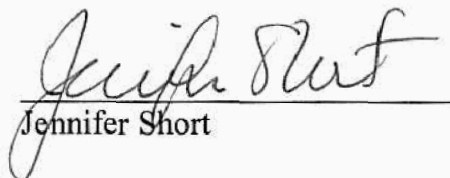
August 18, 2005

CERTIFICATE OF SERVICE

I, Jennifer Short, hereby certify that on this 18th day of August, 2005, a true and correct copy of the foregoing Reply Comments was sent via U.S. first-class mail, postage prepaid, to the following:

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